Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

CITY OF DALLAS, TEXAS, DODD MILLER
Cross-Respondents,

VS.

DALLAS FIRE FIGHTERS ASSOCIATION, et al.,
Cross-Petitioners.

On Conditional Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER THE FIFTH CIRCUIT COURT OF APPEALS ERRED IN GRANTING THE CITY'S AND MILLER'S MOTION FOR SUMMARY JUDGMENT AS TO THE CROSS-PETITIONERS' CLAIMS GIVEN THE EXISTENCE OF A GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER RACE AND/OR RACE BASED "GOALS" OF THE CITY'S AFFIRMATIVE ACTION PLAN ULTIMATELY CONTROLLED DEPUTY CHIEF PROMOTIONS IN VIOLATION OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED AND/OR ARTICLE 5221k OF THE TEXAS CIVIL STATUTES.

PARTIES TO THIS PROCEEDING

The parties to this proceeding are as follows:

City of Dallas	Defendant-Petitioner
Dodd Miller	Defendant-Petitioner
Dallas Fire Fighters Association	Plaintiff-Respondent
Kurtis Allen	Plaintiff-Respondent
Gary Baczkowski	Plaintiff-Respondent
James E. Byford	Plaintiff-Respondent
Donnie G. Campbell	Plaintiff-Respondent
Hal Collins	Plaintiff-Respondent
Kyle S. Cowden	Plaintiff-Respondent
Tommy L. Crawford	Plaintiff-Respondent
Robert Davis	Plaintiff-Respondent
Michael A. Davault, On Behalf of Michael D. Davault	Plaintiff-Respondent
Glenn D. Dickerson	Plaintiff-Respondent
Richard E. Gambrell	Plaintiff-Respondent
Wallace J. Graves	Plaintiff-Respondent
Ronald W. Hall	Plaintiff-Respondent
Kenneth L. Harris	Plaintiff-Respondent
Michael J. Hughes	Plaintiff-Respondent
Harold A. Jerpi	Plaintiff-Respondent

PARTIES TO THIS PROCEEDING – *Continued*

James R. Jones	Plaintiff-Respondent
Russell T. Jones	Plaintiff-Respondent
James A. Jordan	Plaintiff-Respondent
Curtis P. Julian	Plaintiff-Respondent
Paul W. Julian	Plaintiff-Respondent
John E. Keck, Sr.	Plaintiff-Respondent
Parke E. Mainz	Plaintiff-Respondent
Jack S. Martin	Plaintiff-Respondent
David E. Mask	Plaintiff-Respondent
Robert D. McCrimmen	Plaintiff-Respondent
Louis McKay, Jr.	Plaintiff-Respondent
John W. McKinney	Plaintiff-Respondent
Kenneth D. Moore	Plaintiff-Respondent
Allen Mullins	Plaintiff-Respondent
Randy M. Myers	Plaintiff-Respondent
John P. Nimmo	Plaintiff-Respondent
James C. Pearson	Plaintiff-Respondent
Brent K. Rogers	Plaintiff-Respondent
Timothy J. Seymore	Plaintiff-Respondent
Paul A. Skoog	Plaintiff-Respondent
John D. Shook	Plaintiff-Respondent

PARTIES TO THIS PROCEEDING – *Continued*

Tony L. Speck	Plaintiff-Respondent
Arthur R. Sullivan	Plaintiff-Respondent
John D. Sutton	Plaintiff-Respondent
Tom Tanksley	Plaintiff-Respondent
Richard Wachsman	Plaintiff-Respondent
Michael J. Watson	Plaintiff-Respondent
Haskell Willeford	Plaintiff-Respondent
Steven B. Wise	Plaintiff-Respondent
Ken Bailey	Plaintiff-Respondent
Johnny E. Bates	Plaintiff-Respondent
Danny Beck	Plaintiff-Respondent
Samuel C. Brodner	Plaintiff-Respondent
Gerald D. Brown	Plaintiff-Respondent
Jesus A. Cantu, Jr.	Plaintiff-Respondent
John R. Colwick	Plaintiff-Respondent
Stephen D. Corder	Plaintiff-Respondent
Gregory J. Courson	Plaintiff-Respondent
Paul Edward Davis	Plaintiff-Respondent
Roy G. Ferguson	Plaintiff-Respondent
David D. Kinney	Plaintiff-Respondent
James B. Lamar	Plaintiff-Respondent

PARTIES TO THIS PROCEEDING – *Continued*

Michael L. McGehee	Plaintiff-Respondent
Joseph E. McKenna	Plaintiff-Respondent
Stephen Louis Mulvany	Plaintiff-Respondent
Jimmy L. Patton	Plaintiff-Respondent
Ray F. Reed	Plaintiff-Respondent
Ronnie W. Roe	Plaintiff-Respondent
Johnny L. Rudder	Plaintiff-Respondent
Sammy Don Sline	Plaintiff-Respondent
Charles Richard Saunders, Jr.	Plaintiff-Respondent
Thomas E. Taylor	Plaintiff-Respondent
Bryant E. Tillery	Plaintiff-Respondent
George Tomasovic	Plaintiff-Respondent
Glenn Truex	Plaintiff-Respondent

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE JUSTICES OF THE UNITED STATES SUPREME COURT:

Cross-Petitioners Dallas Fire Fighters Association, Hal Collins, Robert A. Davis, Thomas R. Tanksley, Richard Wachsman, and Haskell Willeford ("Cross-Petitioners") respectfully pray that this Honorable Court conditionally issue a Writ of Certiorari to review the Judgment and Opinion issued August 5, 1998 by the United States Court of Appeals for the Fifth Circuit ("the Fifth Circuit") in favor of Cross-Respondents City of Dallas, Texas, and Dodd Miller as to the deputy chief claims.

CITATION OF OFFICIAL AND UNOFFICIAL REPORTS BELOW

The Fifth Circuit's opinion, cited as *Dallas Fire Fighters Ass'n, et al. v. City of Dallas, et* al., 150 F.3d 438 (5th Cir. 1998), affirmed in part and reversed in part the Final Judgment of the United States District Court for the Northern District of Texas, Dallas Division ("the District Court"), and rendered judgment in favor of the City and Miller with respect to the deputy chief claims only. The District Court's opinion is cited as *Dallas Fire Fighters Ass'n, et al. v. City of Dallas, et al.*, 885 F.Supp. 915 (N.D. Tex. 1995).

STATEMENT OF JURISDICTION

Cross-Petitioners file this Conditional Cross-Petition for Writ of Certiorari appealing the Fifth Circuit's August 5, 1998 Opinion and Judgment. This Court has jurisdiction under 28 U.S.C. §§ 1254(1), 2106, and Rules of the Supreme Court of the United States, Rule 12.5 (the City's Petition for Writ of Certiorari was docketed December 14, 1998) to conditionally review, on a Writ of Certiorari, the Fifth Circuit's Opinion and Judgment.

CONSTITUTIONAL PROVISIONS AND STATUTES

The following constitutional provisions and statutes are involved in this case: U.S. Const. Amend. XIV, § 1; 42 U.S.C. §§ 1983 and 1988 (1994); 42 U.S.C. §§ 2000e-5, et seq.; Tex. Const. Art. 1 § 3; Tex. Rev. Civ. Stat. Ann. Art. 5221k, § 5.01 (West 1989)(now codified as Tex. Lab. Code Ann. § 21.051 (West 1996)).

STATEMENT OF THE CASE

1. Statement of Facts

In 1990, Miller, on behalf of the City, selected Robert Bailey, black, as deputy chief. Based upon deputy chief test scores, all candidates for promotion to deputy chief were ranked from highest to lowest on a list of eligibles. Cross-Petitioners (caucasians), were ranked higher than Bailey on the list of eligibles. Normally, the person ranked highest on the list of eligibles is selected for promotion. Miller avered in his affidavit that he selected Bailey because Bailey was capable of performing the deputy chief job responsibilities, was recommended by his executive staff, and was promoted pursuant to the City's Affirmative Action Plan ("AAP"). (R. Vol. V., p. 170). The AAP contained various goals for the promotion of executives (including deputy chiefs), with the goal of twenty-five (25%) percent for blacks. (R. Vol. V., p. 103). Miller never avered that his decision to select Bailey was not ultimately controlled by the "goals" of the AAP. Miller never avered that he compared the qualifications of Bailey with the qualifications of any of the Cross-Petitioners or anybody else. Furthermore, the City's responses to Cross-Petitioners' Interrogatory No. 4 setting forth the reasons for Bailey's promotion makes no mention of a recommendation by Miller's staff as does his affidavit and no explanation was provided by the City or Miller for this discrepancy. (R. Vol. VI., Exhibit B). As a result of Miller's promotion of Bailey to the

deputy chief position in an effort to meet racial goals, Cross-Petitioners were denied promotion, thereby trammeling their rights.

2. Basis of Federal Jurisdiction in Court of First Instance

Jurisdiction in the court of first instance, the United States District Court for the Northern District of Texas, Dallas Division, is based on the following: 28 U.S.C. § 1441; 28 U.S.C. § 1331; 28 U.S.C. § 1343(a); and 28 U.S.C. § 1367(a).

ARGUMENT AND AUTHORITIES

I. WHETHER THE FIFTH CIRCUIT COURT OF APPEALS ERRED IN GRANTING THE CITY'S AND MILLER'S MOTION FOR SUMMARY JUDGMENT AS TO THE CROSS-PETITIONERS' CLAIMS GIVEN THE EXISTENCE OF A GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER RACE AND/OR RACE BASED "GOALS" OF THE CITY'S AFFIRMATIVE ACTION PLAN ULTIMATELY CONTROLLED DEPUTY CHIEF PROMOTIONS IN VIOLATION OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED AND/OR ARTICLE 5221k OF THE TEXAS CIVIL STATUTES.

Cross-Petitioners seek the issuance of a Writ of Certiorari only on the condition of the Court granting the City's and Miller's Petition for Writ of Certiorari.

In the event that the Court grants the City's and Miller's Petition for Writ of Certiorari, the Court should also issue a Writ of Certiorari based upon the Fifth Circuit's rendering of judgment in favor of the City and Miller with respect to the Cross-Petitioners' claims. Specifically, a genuine issue of material fact exists as to whether Miller, on behalf of the City, used Robert

Bailey's race, in an effort to meet AAP goals, as a trump card in deciding to select him for promotion to the deputy chief position in violation of Title VII. *Johnson v. Transportation Agency of Santa Clara,* 480 U.S. 616, 107 S.Ct. 1442 (1987). This issue caused a split in the Fifth Circuit panel that decided the case below, generating a dissenting opinion calling for the City's and Miller's summary judgment motion to be denied as to these claims. *Dallas Fire Fighters Ass'n*, 150 F.3d at 443.

Because Miller and the City had the burden of proof on summary judgment to eliminate every possibility or inference that race was not a trump card in the Bailey promotion, the failure ofMiller to aver in his affidavit that race was not the determining factor, that the decision was not ultimately controlled by the racial "goals" of the AAP, and/or that he compared Bailey's qualifications with the Cross-Petitioners' qualifications precludes summary judgment in favor of the City and Miller as a matter of law. *Anderson v. Liberty Lobby,* 477 U.S. 242, 106 S.Ct. 2505 (1986); *Celetex v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548 (1986). When this is coupled with the fact that there was a non-existent relationship between the AAP racial goals for the deputy chief position and the relevant feeder groups, the Fifth Circuit plainly erred in granting the City's and Miller's motion for summary judgment as to the Cross-Petitioners' claims.

At bottom, the Fifth Circuit's ruling with respect to Cross-Petitioners' deputy chief claims so far departed from the accepted and usual course of judicial proceedings, particularly with respect to application of Title VII and summary judgment jurisprudence set forth by this Court, so as to call for an exercise of this Honorable Court's supervisory power. Furthermore, the issues raised herein are closely related to the issues raised in the City's and Miller's Petition for Writ of Certiorari and, if that Writ is granted, then the issues concerning the Cross-Petitioners' deputy chief claims should also be reviewed by this Court for

complete and proper disposition of all outstanding issues in the case.

CONCLUSION

For all of the foregoing reasons, Cross-Petitioners respectfully request that this Honorable Court conditionally grant their Cross-Petition for Writ of Certiorari, reverse the opinion of the Fifth Circuit rendering judgment in favor of the City and Miller as to the Cross-Petitioners' deputy chief claims, remand that sole issue for trial with the District Court, and for such other and further relief, at law and in equity, to which Cross-Petitioners show themselves justly entitled.

Respectfully submitted,

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